Supreme Court of the United States

No. 342

October Term, 1956

CROWN COAT FRONT CO., INC., Petitioner

v.

UNITED STATES

BRIEF FOR THE PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Opinions Below

The Opinion of the Court of Appeals (R. 14) is reported at 363 F. 2d 407 (1966). The Opinion of the District Court (R. 7) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 22, 1966 (R. 33). The petition for a writ of certiorari was filed July 20, 1966 and was granted October 10, 1966 (R. 34). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Statutory and Contract Provisions Involved

1. The Act of June 25, 1948, 62 Stat. 971, 28 U.S.C. 2401(a) provides:

> "§2401. Time for commencing action against United States.
>
> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

2. The Disputes clause of the contract provides (R. 17):

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its

appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Questions Presented

1. Whether the six-year limitation period for district court action (28 U.S.C. 2401(a)) was tolled during the pendency of the mandatory contract disputes clause administrative proceeding?

2. Whether the limitation period was extended until the mandatory administrative proceeding was concluded?

3. Whether a "protective suit" must be filed to stay the running of the limitation period?

Statement of the Case

On May 14, 1956 petitioner contracted with the government to manufacture canteen covers of mildew resistant felt for a total price of $60,691.76. Petitioner was required by the contract to submit samples to the government for testing and inspection prior to manufacture; and the government had the right either to reject or to require correction of samples which did not meet specifications. The contract also contained a standard "Disputes" clause which required the contracting officer to decide "any dispute concerning a question of fact arising under this contract" and provided for appeal of his decision to the Secretary and for decision by the Secretary or his authorized representative, here the Armed Services Board of Contract Appeals (ASBCA) (R. 17). After making laboratory tests of four lots of samples submitted by petitioner for testing and inspection, the government rejected the samples and upon a price reduction of one-half cent per cover—a total of

$270.01—the nonconforming covers were accepted by the government and final delivery of the canteen covers was made December 14, 1956 (R. 17). Petitioner claims that it was not until nearly five years later that it first learned that the government had improperly tested the samples by submitting them to different tests than contemplated by the contract (R. 2). On October 4, 1961 petitioner wrote the contracting officer and demanded a refund of the $270.01 price adjustment and an equitable adjustment for increased production costs resulting from the initial rejection of the samples (R. 17). On February 21, 1962 the contracting officer ruled against petitioner on its claim, finding that the government had determined by "an established commercial test method" that the felt samples were nonconforming and that the price reduction was proper. On February 28, 1963 the ASBCA affirmed his decision (R. 18).

On July 31, 1963 petitioner commenced this action in the District Court. Relying on the Second Circuit's decision in *States Marine Corp. of Delaware v. United States*, 283 F. 2d 776 (2d Cir. 1960), the District Court dismissed the complaint holding the suit was barred by the six-year statute of limitations of the Tucker Act, 28 U.S.C. 2401(a). The District Court's decision was affirmed by the Court of Appeals sitting en banc, five votes to four. Judge Waterman joined by Chief Judge Lumbard and Judges Moore and Smith were for affirmance on authority of *States Marine* (R. 15). Judge Friendly concurred in a separate opinion on the precedent of *States Marine*, however, stating, "If the issue here were now arising in this court for the first time, I might well be persuaded to the position taken by Judge Freedman in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) and by my brother Anderson in dissent" (R. 27). Judge Anderson, joined by Judges Kaufman, Hays and Feinberg, dissented saying, "I am of the opinion that the decision below should be reversed because the limitations period was tolled during the pendency of the administrative proceedings required by the disputes

clause" (R. 28), and said, "It is my opinion that *States Marine Corporation of Delaware v. United States*, 283 F. 2d 776 (2d Cir. 1960), which in cases of this kind operates harshly and unjustly, should be overruled" (R. 31). Judge Waterman stated that a claimant should protect himself by instituting a "protective suit" within the six-year period (R. 26) but Judge Anderson dissented on this issue (R. 21).

Argument

1. *The Statutory Limitations Period Was Tolled by the Mandatory Administrative Proceeding.*

The standard disputes clause of this contract stipulated that "any dispute concerning a question of fact arising under this contract . . . shall be decided by the Contracting Officer. . . . Within 30 days . . . the Contractor may appeal . . . to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall . . . be final and conclusive." Petitioner was required to pursue the "Disputes" clause procedure before bringing this suit, and had he failed to do so, his suit would have been dismissed: *United States v. Holpuch Co.*, 328 U. S. 234, 239, 243 (1946); *United States v. Blair*, 321 U. S. 730, 734-737 (1944). The administrative proceeding is mandatory.

Although, generally, statutes of limitation are regarded as statutes of repose, Courts have been compelled to recognize the right to sue even though by the clock alone the time has run. Thus, the statute of limitations does not begin to run against an action for fraud until its discovery by plaintiff: *Bailey v. Glover*, 88 U. S. (21 Wall.) 342 (1875). The statute has been held to be suspended during the period when plaintiff could not be aware of the accumulating injury resulting from defendant's wrongful conduct: *Urie v. Thompson*, 337 U. S. 163 (1949). The modern view is to hold that the period of limitations is tolled because of the

plaintiff's innocence even though defendant had no knowledge that the claim would be made against him, and that rule has been applied where the time limitation is fixed by the same statute which creates the cause of action. Thus in *Glus v. Brooklyn Eastern Terminal*, 359 U. S. 231 (1959), the three-year statutory period of limitations fixed by the Federal Employers' Liability Act was held inapplicable because defendant had fraudulently induced plaintiff's delay by representing that he had seven years in which to sue. In *Burnett v. New York Central R. Co.*, 380 U. S. 424 (1965), the Court held that where a timely FELA action brought in a state court having jurisdiction was dismissed for improper venue, the FELA statute of limitations was tolled during the pendency of the state suit. And see *Telegraphers v. Ry. Express Agency*, 321 U. S. 342 (1944).

There is only a limited scope of judicial review of agency disputes clause decisions under the Wunderlich Act, May 11, 1954, C. 199, §1, 68 Stat. 81, 41 U.S.C. §321. See *United States v. Utah Constr. Co.*, 384 U. S. 394 (1966); *United States v. Grace & Sons*, 384 U. S. 424 (1966); *United States v. Bianchi & Co.*, 373 U. S. 709 (1963). While it cannot be said that the Government has misled petitioner, its procurement requirements established a method for preliminary determination of disputes and required petitioner to pursue this administrative review. Since the Government through its contracting officer and the ASBCA not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceeding: *Northern Metal Co. v. United States*, supra, 350 F. 2d at pages 836-839; *Crown Coat Front Co. v. United States*, supra, dissenting opinion, 363 F. 2d at p. 416; *Nager Elec. Co. v. United States*, Ct. Cl. No. 348-64, decided October 14, 1966, slip op. 24-25.

In *Nager Elec. Co. v. United States*, supra, Judge Davis observed, at slip op. 13, that *Soriano v. United States*,

352 U. S. 270, 274-275 (1957), relied upon by Judge Waterman in the opinion below (R. 25) and referred to by Judge Friendly in his concurring opinion (R. 27) involved pursuit of a non-mandatory administrative remedy; and at slip op. 15, that *McMahon v. United States*, 342 U. S. 25 (1951), relied upon by Judge Waterman in the opinion below (R. 19) involved only a procedural step. Even there the Court noted, *McMahon v. United States*, supra, 342 U. S. at p. 28: "We find it inappropriate to consider whether the statute of limitations is tolled for a maximum of 60 days while a claim is pending and not disallowed either by notice or by operation of the regulations."

It cannot any longer be said that by the "Disputes" clause the parties have contracted for settlement of disputes in an *arbitral* manner: *United States v. Wunderlich*, 342 U. S. 98, 100 (1951), since the Court has more recently declared in *United States v. Utah Constr. Co.*, 384 U. S. 394, 442 (1966) that the Armed Services Board of Contract Appeals acts in a *judicial* capacity when it resolves disputed issues of fact.

It is difficult to reconcile the decision below with the Wunderlich Act, supra. Under that statute no suit may be maintained unless the contractor can say that the final administrative decision is arbitrary, capricious, fraudulent, grossly erroneous, or not supported by substantial evidence. Petitioner cannot aver any of these factors until the administrative decision has actually been rendered: *United States v. Utah Constr. Co.*, supra, 384 U. S. at p. 399. The Wunderlich Act requires the administrative proceeding as a necessary step before judicial relief. It would be unreasonable to suppose that the Congress enacted the Wunderlich Act without recognizing that the administrative proceeding required would toll the running of the statute of limitations: *Nager Elec. Co. v. United States*, supra, slip op. 16, n. 22.

If the time when the administrative proceeding was pending is to be excluded from the computation of the six-year limitation, this action is not time-barred (R. 21, n. 7).

It is respectfully submitted that the statute of limitations was tolled during the pendency of the mandatory "Disputes" clause administrative proceeding. It next remains to determine whether the statute was extended by the mandatory administrative proceeding.

2. *The Statutory Limitations Period Was Extended by the Mandatory Administrative Proceeding.*

Since the decision below, the Court of Claims, per Davis, J., on October 14, 1966, decided *Nager Elec. Co. v. United States*, Ct. Cl. No. 348-64, ruling that the limitations statute commences to run upon the final administrative decision under the "Disputes" clause.

Petitioner argued before the Court of Appeals that the statute of limitations did not run until the mandatory administrative determination was rendered by the ASBCA (R. 15-16).

In the Court of Appeals petitioner cited *Cosmopolitan Mfg. Co. v. United States*, 156 Ct. Cl. 142, 144, 297 F. 2d 546, 547 (1962), cert. denied 271 U. S. 818 (1962); *Electric Boat Co. v. United States*, 81 Ct. Cl. 361, 367-368 (1953), cert. denied 297 U. S. 710 (1936); see *Nager Elec. Co. v. United States*, supra, slip op. 6.

The "Disputes" clause here involved is mandatory and since petitioner's claim was required to be processed thereunder, petitioner's claim did not accrue upon completion of deliveries under the contract, and its judicial claim did not ripen so as to trigger limitations until the duly invoked decision of the ASBCA was rendered. See *United States v. Clark*, 96 U. S. 37, 43-44 (1878); *United States v. Taylor*, 104 U. S. 216, 222 (1881).

Petitioner or any other contractor has no right to demand money on a claim until the administrative procedure is finished. He has bound himself to that course, and, in effect, has agreed to convert a breach of contract claim to one for relief under the contract: *United States v. Utah Constr. Co.*, 384 U. S. 394, 404 n. 6 (1966). Until

the ASBCA acted in this case, there was no judicially cognizable injury to petitioner and no claim for court relief by petitioner. Utilization of the administrative procedures contractually bargained for was required: *United States v. Grace & Sons*, 384 U. S. 424, 428 (1966). When the issue raised by petitioner's complaint below came to Court, the judicial proceeding under the Wunderlich Act, 41 U.S.C. 321, 322, was concerned only with the issue whether the final administrative decision was arbitrary, capricious, fraudulent, grossly erroneous, not supported by substantial evidence, or erroneous in law. Petitioner could not aver any of these things until the ASBCA decision had actually been rendered and it had to await the ASBCA determination before it could attack it. Petitioner could not fulfill the requirements of the Wunderlich Act for seeking relief if it brought suit before the ASBCA had acted. It could not even claim that it had suffered damages since the ASBCA might give it full recompense by its decision and that could not be determined until the decision was rendered. Until it had a right to demand payment, its claim had not accrued. Its right of action *first accrued* under 28 U.S.C. 2401(a) when it had the right to demand payment and not before: *Nager Elec. Co. v. United States*, supra, slip op. 14-16.

In *Nager Elec. Co. v. United States*, supra, slip op. 19-23, Judge Davis advanced very cogent reasons for *States Marine* and *Northern Metal* being authority only for actions under the Suits in Admiralty Act and not for actions under the Tucker Act, such as the present one, and he concluded, slip op. 23:

> "For these reasons, we think that *States Marine* and *Northern Metal*, dealing as they do with the Suits in Admiralty Act and apparently a different type of claim, are distinguishable from suits like the present and the related cases under the Tucker Act. We do not believe the principle of those opinions should be extended to our class of case which is largely governed by a separate history and different considerations."

It is submitted that *Nager Elec. Co. v. United States*, supra, is declarative of the law on this issue, and that the Court should conclude that the statute of limitations did not commence to run against petitioner until the ASBCA decision was issued on February 28, 1963.

It is submitted that the mandatory administrative proceeding under the "Disputes" clause extended the statute of limitations to the date of final determination thereunder. It next remains to determine whether a "protective suit" was required.

3. *A Protective Suit to Stay the Running of the Statutory Limitations Period Was Not Required.*

Judge Waterman said (R. 26):

> ". . . if a claimant is uncertain whether he should proceed at once with a Tucker Act suit or first submit a dispute, pursuant to his agreement, to the ASBCA, he may always protect himself by instituting a 'protective suit' within the six-year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him."

Judge Anderson in his dissent said (R. 31):

> "I do not believe that the contractor's ability to bring a protective suit is a satisfactory solution to the problem. Such a procedure would inevitably lead to the defeat of many legitimate claims in the cases of claimants who are unaware of the need for bringing such protective actions. Furthermore, it would have the unfortunate effect of increasing the burden of the district courts by causing still more crowding of already crowded dockets with lawsuits which will languish for years during the pendency of administrative proceedings, and which in all probability will never come up for trial. Therefore, as a matter of sound judicial administration the requirement that a protective suit be commenced within the period of limitations has little to commend it."

In *Northern Metal Co. v. United States*, supra, 350 F. 2d at p. 839, Judge Freedman, writing for the 3rd circuit, said:

> "We do not believe it would be in accord with the congressional purpose to require the bringing of a 'protective' libel in cases such as this. The dockets of the courts are too crowded for Congress to have intended that suits must be brought while the governmental tribunal is engaged in ascertaining the facts which will determine whether the Government will pay the claim."

Judge Davis writing for the Court of Claims in *Nager Elec. Co. v. United States*, supra, said, slip op. 17:

> ". . . It is suggested that, if suit had to be filed while administrative proceedings were still pending, this court could and would undertake to supervise the course of those proceedings, but we cannot see that the court would properly take any such steps which the Government could not, more easily, take for itself. And on the defendant's view there would be many more cases lying limply on our docket, awaiting administrative determination, which we could neither process further nor effectively call to life."

It is submitted that the proper view is that a "protective suit" was not required of petitioner, and the Court is respectfully requested to so rule.

Conclusion

For the foregoing reasons, we respectfully submit that the decision below, that the suit was time-barred by the statute of limitations, should be reversed.

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